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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~107~~. 1

STANDARD OIL COMPANY, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

## BRIEF FOR AMICUS CURIAE.

**(Citrin-Kolb Oil Company.)**

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## BRIEF FOR AMICUS CURIAE.

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The decisions below, jurisdiction to review, and statute involved are set forth at pp. 1-2 of Petitioner's Brief.

## STATEMENT OF THE CASE.

The Complaint in this case challenged the right of Petitioner under the Robinson-Patman Act to sell its gasoline to its four jobber customers in Detroit at 1½¢ per gallon less than it sold to its service station customers in the same area (R. 2, 34). Petitioner defended on the ground that it made the lower price in order to retain the four jobbers as customers and to meet in good faith equally low prices

offered them by competitors. Amicus Curiae, Citrin-Kolb Oil Company, is one of the four jobbers, and is immediately affected by the order of the court below.

## THE FACTS.

Amicus will add to the facts stated by Petitioner only such facts as will underscore its interest in this proceeding. It began operations in 1922 and was recognized as a jobber by Petitioner in 1929, after which it engaged largely in the wholesale business (R. 5060). It operated retail stations only when a station it owned or leased became tenantless, and then only until some suitable tenant could be found (R. 859, 5060). The amount of gasoline sold by it at retail declined from 15.4% in 1937 to 6.5% in 1940 (R. 5060). From January 1, 1938, to December 31, 1940, Amicus sold a million gallons of gasoline annually to Langer and Cohen, retail service station operators, at 1 cent per gallon off tank-wagon price; and it sold another retail service station operator at ½ cent per gallon off tank-wagon price (R. 5166). The lower prices to Langer and Cohen and the other retailer were made by Amicus to meet offers by competing sellers at a lower price (R. 893-894, 883). Amicus has been identified with Petitioner's products from 1926 at least (R. 1258), and the business of Amicus and its station-customers has been built around Petitioner's products.

## THE INTEREST OF AMICUS.

If the order of the court below is permitted to stand, the business of Amicus will be seriously threatened: (1) it will not be able to meet the competition of other jobbers or suppliers who seek to lure its service-station customers by lower prices; (2) it will be unable to supply such of its service stations as it is compelled temporarily to operate during tenantless periods without paying Petitioner a different and higher price; (3) it will be able to compete freely only if it changes to some other supplier and abandons the Standard Oil good will that it has built up over the past

quarter of a century; and (4) it might then lose some of its service-station customers who have likewise been identified with Petitioner's products over a long period, and might wish to retain a Standard Oil affiliation.

Amicus is alarmed by the challenge, inherent in the decision below, to the traditional right of a jobber to sell both at wholesale and retail. It believes that any fetters on free competition in the oil industry must react to its own disadvantage. It submits that the face of the statute requires reversal of the decision below. Were the statute less plain, weighty considerations of policy should yet impel this Court to adopt a construction of § 2(b) of the Robinson-Patman Act necessitating reversal.

## SUMMARY OF THE ARGUMENT.

I. Section 2(b) creates an exemption from the prohibitions of § 2(a). This is uncontroverted with reference to the "cost" differential proviso of § 2(a) which affords the "justification" of § 2(b) that "rebuts" the Commission's prima facie case, and which can not be defeated by proof of "injury to competition". The parallel § 2(b) provision for "rebutting the prima facie case" by showing that the "lower price * * * was made in good faith to meet an equally low price" must equally be given the effect of a conclusive "defense" or exemption.

The view of the court below that removal of the "meeting competition" proviso from § 2(a) and its insertion in § 2(b) removed it from the "defense category" gives to mere physical location the effect of an implied repeal when requirements of draftsmanship furnish an easier explanation. The Commission's argument that the § 2(b) "rebuttal" may be defeated by a showing of the "injury to competition" prohibited by § 2(a) makes the availability of the exemption from the prohibition turn on the absence of the prohibited conduct. This provides a defense where none is needed and reads the exemption out of the statute. Such a construction is so unreasonable as to require rejection.

The legislative history is too confused to carry weight and were it clearer, it could not alter the plain meaning of the statutory language, since a literal construction does not produce an absurd or unreasonable result.

II. The privilege accorded by § 2(b) to a seller of defending himself against a competitor who lures his customers by a lower price is as vital in a competitive economy as the right of self defense against personal attack. It also benefits consumers because competing offers of lower prices to a seller's customers generate pressure conducing to lower prices.

The practical consequences of the order below are of no benefit to consumers or retailers and directly injure Amicus and Petitioner. Were § 2(b) less plain, the Court should reverse an order which injures some without helping others.

## ARGUMENT.

### I.

### The Face of the Statute.

Section 2(a) contains prohibitions from which, we shall demonstrate, § 2(b) grants an exemption. The Commission maintains that availability of that exemption depends on proof that Petitioner was not guilty of the conduct prohibited. Such a construction offends common sense and is precluded by the plain terms of the statute.

Section 2(b), 15 U. S. C. §13(b) provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of *rebutting the prima facie case* thus made by showing *justification* shall be upon the person charged with a violation of this section, and *unless justification* shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller *rebutting the prima facie case* thus made by showing that his lower price or [illegible] furnishing of services or

facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Emphasis supplied throughout)

The "rebuttal" and "justification" provided for by the first part of § 2(b) incontrovertibly furnish a complete defense to the Commission's prima facie case in the case of the "cost" differentials exempted by the "cost" proviso of § 2(a). This results from the express terms of the proviso [15 U. S. C. § 13(a)]:

> "*Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery * * *."

And the court below recognized that:

> "The amended Section 2(a) * * * *kept as a defense* the cost savings and other defenses of the Clayton Act, * * *." (R. 5300)

Proof of a cost differential, therefore, in "rebutting the prima facie case" under the first clause of §2(b) furnishes "justification" in terms of a conclusive defense. That the "justification" was meant to be conclusive is further demonstrated by the fact that

> "*unless* justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination * * *."

By plain implication, this language exhibits an intention to withhold the power to issue an order *if* "justification shall be affirmatively shown." And it manifestly leaves no room for a replication by the Commission that there has been an injury to competition.

The § 2(b) first part provision for "rebutting the prima facie case * * * by showing justification," including proof of "cost differentials," is paralleled by the second part provision for "rebutting the prima facie case * * * by show-

ing" the meeting of competition in good faith. Since the first part of § 2(b) equates rebuttal with a conclusive "defense," the identical provision for "rebutting the prima facie case" by proof of "meeting competition" contained in the second part of § 2(b) must equally be given the effect of such a "defense." This Court has itself made that identification:

> "The Robinson-Patman Act was passed to deprive a large buyer of such [quantity-purchase] advantages *except* to the extent that a lower price *could be justified* by reason of a seller's *diminished costs* due to quantity manufacture, delivery or sale, *or* by reason of the seller's good faith *effort to meet* a *competitor's* equally *low price.*" *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43.

As the italicized word "except" suggests, we are dealing with an "exemption" from the prohibitions of § 2(a). The "cost" differential proviso contained in § 2(a) is patently an "exemption" from those prohibitions; and this Court has analogized the "justification" under § 2(b) to the "exemption" afforded by § 2(a):

> "the general rule of statutory construction that the burden of proving *justification* or *exemption* under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of § 2(a). Secondly, § 2(b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44-45.

This statement is in accord with the House Report on the original Patman bill, which, in discussing § 2(a) of that bill, the language of which is the same as the present § 2(b), stated:

> "This proviso represents a *contraction* of an *exemption* now contained in section 2 of the Clayton Act

which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is *permitted to meet local competition*, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the *proviso permits* the seller *to meet the price* actually previously offered by a local competitor * * *."[1]

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[1] H. Rept. No. 2287, 74th Cong., 2d Sess., p. 16 (1936).

"As originally introduced, the Robinson-Patman amendment contained no provision similar to that in §2 of the Clayton Act as originally enacted, which provided 'That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition.' In the Senate this existing provision was added by amendment to the Robinson-Patman bill. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with the proviso, substantially as enacted in §2(b). 80 Cong. Rec. 8139. The Conference Committee rejected the Senate version and approved the House amendment." Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746, 752, n. 1.

Thus the intention of the House was given effect.

We have referred to the legislative history to confirm its plain meaning. On the whole, however, the debates are so equivocal and confused as to preclude confident resort thereto. Here, as in Gemsco, Inc., v. Walling, 324 U. S. 244, 260,

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

Were that history less equivocal, it could yet not derogate from the plain meaning of the statutory terms, since a literal application does not produce an absurd or unreasonable result. R. E. Schanzer v. Bowles, 141 F. (2d) 262, 264; Fides, A. G. v. Comm'r of Internal Revenue, 137 F. (2d) 731, 735; Wodehouse v. Comm'r of Internal Revenue, 166 F. (2d) 986, 992; Hatfried, Inc. v. Comm'r of Internal Revenue, 162 F. (2d) 628, 631; Peoples Natural Gas Co. v. Federal Power Commission, 127 F. (2d) 153, 155; McComb v. C. A. Swanson & Sons, 77 F. Supp. 716, 732.

Manifestly it was the intention of the House to perserve the "meeting competition" defense, to "contract" rather than withdraw the "exemption".

As we read the record, three arguments *contra* have been relied on by the Commission and the court below. We have pointed out that the reliance of the court below on the legislative history is misplaced. *Supra* note 1. The court likewise advanced the view that the amended § 2(a)

> "*took out of the defense category* the provision for making a lower price to meet competition. As to this it was provided in Section 2(b) * * *." (R. 5300)

Thus the mere physical location of one exemption as contrasted with another was transformed into an implied repeal. An implied repeal is not favored, and there is an easier explanation. The present § 2(b) is broader in scope than the original Clayton Act proviso; it refers not only to discrimination in price as did the prior § 2, but also to services and facilities, now covered by § 2(e). Location of the proviso in § 2(a), which substantially re-enacts the old § 2, would have required that it be repeated in the new § 2(e), a repetition avoided by incorporating the exemption in § 2(b).

Finally, the Commission seeks to defeat the § 2(b) exemption by resort to § 2(a), maintaining

> "The meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the prima facie case."

This, the Commission elaborates,

> "results from the difference between such a case and the *prima facie* case referred to in Section 2(b). Section 2(b) defines a prima facie case as '* * *proof * * * that there has been discrimination in price * * *.' *This definition must be compared with the prohibitions of Section 2(a)* which makes such a dis-

> crimination unlawful only in the event it injuriously affects competition. If proof of good faith in meeting an equally low price of a competitor is made, then Commission could no longer rely upon its prima facie case, but must show additional and affirmative evidence that the effect of the discrimination may be to substantially lessen competition * * *. Where such injurious effect on competition is affirmatively proved, the proof made as to meeting an equally low price of a competitor under the proviso of Section 2(b) does not constitute a substantive justification or defense." (R. 5180-5181)

Thus the Commission makes the test of the exemption from the prohibition of § 2(a) the absence of the conduct prohibited!

To implement the prohibition of § 2(a), § 2(b) sought to lift from the Commission the burden of *proving* that a price discrimination *resulted* in substantial *injury to competition* by making proof of price discrimination alone a prima facie case. It remained open to the Commission, of course, to fortify this presumption, to bolster its prima facie case by proof of actual injury to competition. But the § 2(b) rebuttal becomes necessary only when there is a violation of § 2(a), whether that violation be shown by presumption or proof. Stated differently, § 2(b) provides for a complaint (which can rest on the prima facie case), an answer rebutting—and no more. The Commission would import into § 2(b) a "replication" to the answering rebuttal of respondent,[2] a "replication" for which no provision was made, and which would merely consist in proving the § 2(a) injury to competition which Congress declared *need not be proved.*

If the rebuttal of § 2(b) is only to prevail upon proof that respondent was not guilty of the conduct prohibited by § 2(a), the privilege of rebutting by a showing of "meeting competition" will be transmogrified into a meaningless

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[2] The Commission is of course free to disprove the "rebuttal" of meeting competition in good faith without "replication." Compare Rules 7(a) and 7(d) of the Federal Rules of Civil Procedure.

maneuver. The Commission's attempt to make the § 2(b) exemption from the prohibitions of § 2(a) turn on proof that respondent was not guilty of the conduct prohibited by § 2(a) would read the § 2(b) exemption out of the statute. For the lower price to meet competition, conferring, as it must, a price advantage to the favored customer over other customers, will in almost every case involve a "reasonable possibility" of injury to competition and hence constitute an unlawful "discrimination." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. In sum, § 2(a) prohibits only discriminations which substantially lessen competition. Where a discrimination does not have that effect, there is no need to invoke § 2(b). To make the § 2(b) exemption depend on conduct that is not prohibited by § 2(a) is to provide a defense where none is needed. Thus the Commission's construction of § 2(b) is so unreasonable as to require rejection.

We submit, in light of the foregoing, that the terms of § 2(b) disclose that proof of meeting competition in good faith, like proof of the cost differentials of § 2(a), furnishes a complete defense and exempts the respondent from the prohibitions of § 2(a).

## II.

## Considerations of Policy.

(a) Were the statute less plain—and the divided counsels of the Government (See Petitioner's Brief, pp. 29-35) demonstrate that the Section is at best equivocal—considerations of policy would yet dictate reversal of the decision below. Construction of an equivocal statute requires analysis of the underlying practicalities. Cf. *Textile Mills Sec. Corp.* v. *Comm'r of Internal Revenue*, 314 U. S. 326, 335. As Mr. Justice Holmes said of a truly doubtful case,

> "what really is before us is a conflict between two social desires, each of which cannot both have their

way. The social question is which desire is stronger at the point of conflict."[3]

The conflicting desires in the present case are highlighted by the divisions in the Government: the desire of the Anti-Trust Division, which we share, to foster free competition,[4] as opposed to the Commission's desire to swaddle a particular group in anti-competitive safeguards.

That we are not unjust in thus describing the Commission's position is made manifest by the record. Harrison, a Government witness, testified that to prevent Standard Oil from selling to the four jobbers involved and to substitute a comparable major company as seller "would not in any way cure or help to cure this competitive [retail] situation." (R. 344-345). Thereupon Commission counsel asked

> "if *all* of the major oil companies were prevented from selling to retail operators at tank car prices in the Detroit area, would that improve the competitive situation in Detroit?
>
> "A. I think it would."[5]

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[3] Quoted in Frank, *Law and the Modern Mind*, 258 (1935).

[4] "While we recognize the competitive problem which arises when one purchaser obtains advantages denied to other purchasers, we do not believe the solution to this problem lies in denying to sellers the opportunity to make sales in good faith competition with other sellers." Assistant Attorney General Bergson testifying before H. Comm. on Judiciary, Hearings on S. 1008, 81st Cong., 1st Sess., June 8, 1949, p. 12.

[5] The Trial Examiner found that a "marketeer" with a favorable differential

> "reduces his price to the public. That is always the start of the price cutting orgies which occur periodically.
>
> "If *all* the major oil companies were prevented from selling to retail operators at tank-car prices in the Detroit area it would improve the competitive situation in Detroit." (R. 5118)

In a vigorous dissent from the Commission's Order (R. 5257, 5269) Commissioner Lowell B. Mason stated:

> "In my opinion, the Commission in this case has dealt with the facts and the law just as Procrustes dealt with the unfor-

This was reaching for the moon; for those suppliers who sell only to jobbers, including the jobbers engaged in retail operations, are outside the ban of the Robinson-Patman Act, as the court below recognized.[6] But it harks back to the desire to insulate middlemen from competition which inspired the Robinson-Patman amendment.

That amendment was engrafted on the anti-trust law—the legal mainspring of competition—largely in response to pressure[7] by middlemen for protection from the oversuccessful competition of the chain stores. By employing streamlined methods of distribution, by developing low-gross high-volume selling, the chains demonstrated the inefficiency of the older high-gross low-volume method of distribution. They markedly reduced the cost of distribution,

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tunate guests who slept in his bed. The Commission has cut off the facts of the case that do not fit in with the order, and it has stretched out the statute until it is no longer the law Congress passed but becomes the law that the Commission would like to enforce."

We commend the realistic analysis of Commissioner Mason to the Court.

[6] R. 5304. And the Commission has squarely held that a manufacturer may sell at "one-price" to wholesalers and selected retailers, Bird & Co., Inc., 25 F. T. C. 548 (1937); and see cases digested in Chairman Ayres' report to the Congress, 81 Cong. Rec. App. 2339, 2340 (1937), even though those retailers who purchase from wholesalers at a mark-up are necessarily placed at a competitive disadvantage as against the "selected" retailers.

[7] McNair, *Marketing Functions and Cost and the Robinson-Patman Act* (1937) 4 Law and Contemp. Prob. 334; Burns, *The Anti-Trust Laws and the Regulation of Price Competition* (1937), 4 Law and Contemp. Prob. 301, 308; Evans, *Anti-Price Discrimination Act of 1936* (1936), 23 Va. L. Rev. 140, 140-146; Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A. & P. Case*, 58 Yale L. Jour. 969, 970 (1949).

We do not suggest that *unequivocal* legislation, enacted in response to "pressure", should be inhospitably received, but merely that in construing an ambiguous portion of the pressure-generated Robinson-Patman Act, the Court may more safely rely on the main stem of anti-trust principle than on a "pressure" deviation therefrom.

thereby making an important economic contribution; for while mass production has steadily reduced costs, there remains a large spread between such costs and retail prices. Measured by the interest of consumers, the Robinson-Patman amendment merely preserved from the purging force of competition a group of middlemen who levied an uneconomic toll on the ultimate consumer.[8]

Section 2(b) was a little oasis in this anti-competitive desert; it authorized a seller to defend himself against a competitor who sought to lure a customer through a low price. We cannot improve on the explanation by highly-placed Commission officials in 1941—which, if it ran *against* petitioner, would doubtless be dignified as a contemporaneous administrative construction:

> "The amended Act now safeguards the right of a seller to discriminate in price in good faith to meet an equally low price of a competitor * * *. The right of self-defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack." T. N. E. C. Monograph No. 42 at p. 139 (1941) "*An Analysis of the Basing-Point System* * * *" by Walter B. Wooden, Assistant Chief Counsel and Hugh E. White, Examiner, of the Federal Trade Commission.

This right of self defense also conferred a boon on consumers, for "aggressive buying makes inroads on fixed prices." Learned and Isaacs, *The Robinson-Patman Law:*

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[8] It is one of the ironies of this "pressure" legislation that the Court below should have suggested the elimination of wholesale groups, a chief sponsor of the Act. The Court suggested that Standard Oil "discontinue selling to wholesalers at a price different from that made to retailers," saying that this could result in "elimination of wholesalers" "only where their existence cannot be justified except on the exploitation of a differential in price *not justified by* any *cost savings* to obtain that price" (R. 5300). This would appear to dispatch the well-recognized functional discounts to wholesalers as distinguished from retailers. Thus does an irrational amendment spawn irrational consequences.

*Some Assumptions and Expectations* (1937) 15 Harv. Bus. Rev. 137-139. It is well-known that

> "manufacturers frequently hesitate to make downward price changes for fear of 'spoiling the market' in case demand proves to be inelastic." McNair, *supra* note 7 at 337.

One of the few ways in which a seller's "one-price policy" could be influenced downward under the Robinson-Patman Act was by the pressure of competing offers to his customers at a lower price. Given enough of these, the seller would be forced to react to buyer pressure and lower his prices all along the line.[9]

It must not be over-looked that a small seller too may find that his customers are being lured by the lower prices of competing sellers, large and small. To force such a seller to make a general reduction of his prices in order to meet competition is to depriye him of the right of self defense, for a general reduction can often drive him to the wall.

Nor should the effect of an individual price-reduction to meet competition be under-valued. Sellers have learned that a price reduction has an

> "unfortunate tendency to spread, as the long history of frantic efforts to stamp out price discrimination will testify." [10]

Thus the price reduction to meet a competitor's lower price may be the entering wedge for generally lower price levels.

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[9] Criticism has been levelled at the oil industry on the ground that it is gripped by

> "a pronounced fear of 'spoiling the market,' and a corresponding disinclination to undertake open price competition." Rostow, *A National Policy for the Oil Industry*, 12 (1948).

Were an oil seller to risk 'spoiling the market' in order to meet competition, he would run into the ban of the decision below unless he would cut prices all along the line.

[10] Note in Yale L. Jour. *supra*, note 7 at 975, and see Adelman, *Effective Competition and the Anti-Trust Laws*, 61 Harv. L. Rev. 1289, 1331 (1948).

Abolish price competition and sellers will be constrained to embrace brand competition. But brand emphasis and high advertising costs tend to increase the ultimate price to the consumer and to make for a "sticky" price.[11]

Against this background we submit that § 2(b) should be construed to safeguard a merchant's right of self defense, and to give expression to the consumer's interest in lower prices. We turn from general economic considerations to the practical consequences of effectuating the Commission's position in this case.

(b) Even if the face of the statute afforded stronger support for the Commission's position, the *practical consequences in this case* of the Commission's position should make this Court reluctant to adopt a Procrustean rule. That consumers in Detroit can derive no benefit from an attempt to freeze retail prices is self-evident. It is no less plain that the Detroit retailers cannot benefit from elimination of Standard Oil as the supplier of the "price-cutting" jobbers who sell at retail, for the latter can shift to some other supplier who, because he sells only at the wholesale "one-price", is not prevented from selling to them at Standard's jobbers price or lower. These are not idle speculations, for the Trial Examiner found that Standard's competitors tried at various times to lure these jobbers away by lower quotations for gasoline of like grade or quality (R. 5100-5104). Is not the "injury" to the retailer technical rather than real when the price-cutting jobber can and will receive from Standard's competitor the low price offered by Standard to meet that competitor's equally low price?

The jobber too is placed under serious disadvantages by the order of the court below. Since Standard is advised to cut off jobbers who do not adhere to its prices (R. 5304), the order contemplates that its jobbers will maintain

[11] Burns, Symposium, *The Effectiveness of the Federal Anti-Trust Laws*, 39 Amer. Econ. Rev., at p. 694 (1949); Adelman, *supra*, note 10 at 1328.

those prices. Competing jobbers, who purchase from Standard's "one-price" competitors, labor under no such disability. They may cut prices to their heart's content and lure away service-station customers from Standard's jobbers. To be sure, Standard's jobbers can escape from this restriction by switching to competing suppliers who have offered lower prices. But this is to jettison the good-will built up over a long period of association with Standard's brands, and to impel them to indulge in fresh price-cutting in order to induce acceptance of new brands of gasoline. And it may lose them the customers who have built their business around Standard's brands. The real injury thus inflicted on the jobbers (R. 5103) is balanced by no compensating advantage to retailers, for the jobbers will buy as cheaply elsewhere and continue their price-cutting.

There is finally the effect on Standard. The logic of the decision below requires it to abandon either its service stations customers or its jobbers who sell at retail.[12] True, it may take over the business of its jobbers, but the Gov-

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[12] In his dissent (R. 5257, 5263) from the Commission's Order, Commissioner Lowell B. Mason stamped the Commission's insistence that a jobber be charged one price for what he sells at wholesale and another for what he sells at retail as "determining price by use", stating that it

> "was once considered and flatly rejected by Congress. 'Pricing by use' was including in the House Committee (Judiciary) Report 2287 of March 31, 1936, 74th Cong. 2d Session. This is what it said:
>
> > 'For the purpose of such classification of customers as wholesalers or jobbers or retailers, the character of the selling of the purchasers and not the buying shall determine the classification, and any purchaser who * * * does both a wholesale and retail business shall, irrespective of quantity purchased, be classified as a wholesaler on purchases for sale to retailers only * * * and as a retailer on purchases for sale to consumers.'
>
> This ideology Congress refused to adopt and before final passage of the Robinson-Patman Act, all such language was stricken from the bill."

ernment views with alarm the expanding reach of big business. An alternative is to "police" its customers, though the court below stated that Standard "should not be required to police its wholesalers." (R. 5304). Yet it placed Standard under liability

> "if it sells to a wholesaler it knows or *ought to have known* is engaging in *or intends to engage in* the competitive practices condemned by this proceeding." (R. 5304).

Given jobbers who are known to have engaged in price-cutting in the past, this formula renders "policing" almost inescapable if Standard is to avoid liability in the future. The remedy, suggests the court below, is to cut off price-cutting jobbers—a startling suggestion, coming from a court. Price-fixing is in bad repute; a grudging exception has been made for those who exercise a right to choose customers and reject those who cut prices, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; and this Court not long since said that one who exercises this right treads a "narrow path." *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 729. A misstep from this "narrow path" inferentially invites charges of anti-trust violation which can be safely faced only after the "narrow path" is somewhat more plainly demarked. And the jobbers may shift to Standard's competitors rather than maintain its prices.

We submit that no practical benefits to retailers or consumers can result from the order, that it inflicts useless injuries on retailing jobbers, and that it will deprive "dual" sellers of a large portion of their business without benefiting consumers or retailers. We submit that a construction of § 2(b) which will "permit" a seller to meet competition in good faith will preserve both the seller's right of self defense and the consumer's interest in price competition. These policy considerations should impel this Court to reverse the decision of the court below. Finally,

we submit that the terms of §2(b) plainly require this Court to reverse that decision.

Respectfully submitted,

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